Conceivable Commission of War Crime in Afghanistan

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Abstract

When armies are engaged in combat, war crimes are defined as violations of the law of war. It is a broad conception, and any harm done to humanity in a time of peace is viewed as a war crime. War crimes include any form of human rights violation. For a few decades, the suffering of Afghans was overlooked by the outside world, but it is now unacceptable that Afghanistan's leadership is following suit. There is no comprehensive genocide law in Afghanistan. War crimes in Afghanistan included things like mistreating civilians or POWs. The issue of genocide and associated violence must be addressed. As a result, war crimes in Afghanistan constitute transgressions of international humanitarian law, which carry with them a personal liability and must be thoroughly investigated.

Keywords: Afghanistan, IHL, War Crime, Panjshir, and Genocide

INTRODUCTION

The civilian population of Afghanistan is still suffering greatly as a result of the ongoing military conflict there. The lives and property of Afghans who aren't fighting hasn't received enough attention from combatants on either side, who have also showed little care for limiting the effects of the war on civilians. All sides to the war are urged to completely abide by and respect the laws of international humanitarian law and international human rights law by the independent-

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Afghanistan Human Rights Commission. All activities must put the security of Afghanistan's civilian population first. The Commission expresses special concern over a number of particular activities that flagrantly violate international norms but continue to be used.

The armed conflict ongoing in Afghanistan continues to severely affect the civilian population of the country. Combatants on all sides have shown a lack of sufficient concern for sparing and protecting the lives and property of Afghans not involved in the fighting and for minimizing the impact of the war on the civilian population.[2] The Afghanistan Independent Human Rights Commission calls on all parties to the conflict to fully adhere to and respect the rules of international humanitarian law and international human rights law.[3] The safety of Afghanistan's civilian population must be made a priority in all operations. In particular, the Commission expresses its concern regarding a number of specific practices that are in clear violation of international standards but still keep reoccurring. These are illustrated by a number of recent incidents.[4]

PRACTICES OF CONCERN AND EXAMPLE CASES

Excessive civilian casualties resulting from insurgent attacks and military operations

Attacks by armed groups as well as military operations by national and international forces have repeatedly resulted in the killing and injury of civilians and the destruction of civilian property. International humanitarian law prohibits all forms of violence to life and person directed against any persons taking no active part in hostilities. The intentional targeting of civilians and civilian objects are forbidden. Attacks may only be directed against military targets and the attacking party must do everything feasible to verify that the objectives to be attacked are indeed military in nature.[5] Any civilian casualties caused by such attacks (referred to as "collateral damage") mustnot

[2] Hashimy, S.Q., Magoge, J.S. and Mokarim, A. (2022) *Relentless violation of international humanitarian law during the ongoing conflicts in Afghanistan*, *SSRN*. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4011585 (Accessed: January 31, 2023).

[3] Hudson, Manley O. (1931), "Present Status of the Hague Conventions of 1899 and 1907". The

[4] James Brown Scott (1915), The Hague conventions and declarations of 1899 and 1907 contains the texts of all conventions and the ratifying countries as of 1915.

[5] Article 34 of Afghanistan Constitution states that "Freedom of expression shall be inviolable. Every Afghan shall have the right to express thoughts through speech, writing,

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be excessive in relation to the concrete and direct military advantage anticipated from the attack.[6] There have been some particularly egregious cases in which civilians have been the primary target of an attack. In most instances, however, civilian casualties are the result of operations whose primary purpose is the pursuit of military objectives. [7]Frequently, such casualties are out of proportion to the military benefits of the operation or attack and their infliction thus constitutes not legitimate collateral damage but a serious violation of international humanitarian law.

Suicide attacks carried out by anti-government elements have caused an especially high number of civilian deaths and injuries. Even if directed against military or official targets, such attacks are widely executed without any regard for incidental damage caused. As a result, many suicide attacks against perceived enemy target have primarily resulted in the killing of innocent Afghan bystanders. Particularly damaging are attacks that take place in densely populated areas or in the vicinity of popular gatherings, such as bombings that have occurred in Kabul's market area during rush hour or against soldiers handing out sweets to children.

***Example case:* VBIED attack in Laghman province on 1 April 2007**

On 1 April 2007, in Ali Khael of Laghman province, an Afghan National Army convoy was attacked with a suicide vehicle borne improvised explosive device (VBIED). The soldiers were returning from Qaryghai district, where they had been assisting flooding victims. At approximately 03:15pm the suicide vehicle, a white Corolla, detonated itselfin close proximity to the convoy.[8] The attack was carried out within the city limits, in an area frequented by numerous civilians. It killed ten civilians, including five children, and seriously injured at least thirteen civilians as well as five ANA soldiers. The father of two of the victims describes the aftermath of the bombing: "I was busy repairing the walls of my house when a powerful explosion shook the walls. I saw two people had fallen on the road wounded but I couldn't see my daughters there. Later on I saw their bloody bodies lying on the road. One of my daughter's head and the other's hand was cut. I was deeply

[6] Article 28 of Afghanistan Constitution enshrines that "No citizen of Afghanistan accused of a crime shall be extradited to a foreign state without reciprocal arrangements as well as international treaties to which Afghanistan has joined.

Nigosian, S. A. (2004). Islam. Its History, Teaching, and Practices. Bloomington: Indiana University Press. p. 115

[7] The recognition and legitimacy of the Taliban government: A conundrum ... (no date). Available at: https://www.researchgate.net/publication/361993438_The_Recognition_and_Legitimacy_of_the_Taliban_Government_A_Conundrum_in_International_law (Accessed: January 31, 2023).

[8] American Journal of International Law, 25 (1): 114–117, doi:10.2307/2189634. JSTOR 218963417.

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shocked by this terrible and painful scene, and the people of the village helped me collect the parts of theirbodies" (AIHRC interview, 2 April 2007).

In an e-mail message sent to AIP Jalalabad by Taliban spokesman Zabihullah Mujahid,the group claimed responsibility. The statement said that "the suicide attack was carried out by a Talib, Noman, resident of Laghman province. He struck his explosive laden vehicle with the convoy of foreign and Afghan forces in Ali Khael area of Mehtarlam" (*Taliban claims Laghman suicide attack responsibility*, AIP Jalalabad, 1 April 2007).

Even though the primary target of the attack was a military one, the detonation of a large suicide car bomb in the middle of a civilian area and the consequent loss of life and injuryof people in no way connected to the fighting is in no proportion to any military advantage anticipated. Accordingly, the VBIED attack is in clear violation of the basic principles of international humanitarian law.[9]

Air operations and bombings by international forces have also on several occasions severely affected non-combatants, causing excessive civilian loss of life and injury as well as the destruction of civilian property.[10] While generally real importance is attached to the protection of civilians, even more care must be taken to ensure accurate targeting and minimize any collateral damage incurred in operations.[11]

***Example case:* Aerial bombardment in Kapisa province on 4 March 2007**

On 4 March 2007, international and national forces initiated air and artillery attacks against a residential compound in Jabar village, in the Nijrab district of Kapisa province. According to community residents the attack was directed against one local man suspected of Taliban links, while a US military spokesperson claimed that it targeted two men accused of insurgent activities, who had been seen firing their weapons against a nearby military base. [12]However, the bombing ultimately resulted in the death of nine civilian members of the family of the suspect, including two

[9] Aboul-Enein, H. Yousuf and Zuhur, Sherifa, Islamic Rulings on Warfare, p. 22, Strategic Studies Institute, US Army War College, Diane Publishing Co., Darby PA, ISBN 1-4289-.

[10] Malcolm Shaw (2020), "Geneva Conventions". Encyclopedia Britannica, 4 Mar. 2020,

[11] Article 8 of Afghanistan Constitution highlights "The state shall regulate the foreign policy of the country on the basis of preserving the independence, national interests and territorial integrity as well as non-interference, good neighborliness, mutual respect and equality of rights."

[12] Article 56 of Afghanistan Constitution inflicts that "Observance of the provisions of the Veintmilla, Julian D. (2016) "Islamic Law and War Crimes Trials: The Possibility and Challenges of a War Crimes Tribunal against the Assad Regime and ISIL," Cornell International Law Journal: Vol. 49: No. 2, Article 6. Available at: https://scholarship.law.cornell.edu/cilj/vol49/iss2/6

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pregnant women and four small children, and the injury of five more.[13]

At around 08:45pm the village came under shelling from the nearby ANA base. A first aerial bombardment was initiated at around 09:30pm and a large bomb was dropped onthe compound of the suspect, completely destroying the house and killing all thosepresent. The deceased were all members of the same family and the victims include the around 90 years old grandfather and 75 years old grandmother as well as three women (two of them pregnant) and four children between zero and five years of age. [14]Approximately 30 minutes later, in another air attack, more ordinance was dropped on an adjacent compound and five more people were injured. All those interviewed claimed thatthere was no outgoing shelling or rocketing from the village, though there were reports of insurgents firing one rocket from the nearby Kawalana Pozza mountain.[15]

There was contradictory information as to whether the suspect who was targeted in the attack was really engaged in insurgent activities and whether he was actually present in Jabar village on the day of the attack. It is clear though that even if the accusations againsthim were accurate he was of very limited importance and the military advantage of his possible elimination cannot justify the collateral killing of nine innocent civilians. The attack was thus carried out with excessive force and constitutes a violation of internationalhumanitarian law.

Abuses directed against civilians, including extrajudicial execution, mutilation and the taking of hostages

Anti-governmental armed groups have in several instances directly violated the immunity and protections of the civilian population enshrined in Common Article 3 of the Geneva Conventions. One form violations have taken is the extrajudicial execution or mutilation of persons alleged to have collaborated with the Afghan government or with international forces. A particular target of such attack have been civilian workers, such as truck drivers or construction laborers, whose work is seen to assist international forces. In areas with a substantial insurgent presence, as in some of the districts of Helmand province, those accused of collaboration have been publicly

hanged or beheaded. But even in fully government controlled territory there have been several cases of civilian vehicles being ambushed and their passengers killed or mutilated on the spot.

[13] Clayton Thomas (2021), Afghanistan: Background and U.S. Policy: In Brief, Congressional

[14] Farhad Malekian (2011), Principles Of Islamic International Criminal Law: A Comparative Search 344– 46 (Eugene Cotran, Mark Hoyle & Martin Lau eds., 2d ed. 2011).

[15] Research Service, https://crsreports.congress.gov

Anthony H. Cordesman, Burke Chair in Strategy with the Assistance of Bryan Gold and Sean

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> Anti-government groups have also resorted to the taking of hostages, kidnapping protected civilian persons including journalists, aid workers and medical personnel. Kidnap victims have been ransomed for money or exchanged for Taliban prisoners and, if demands were not met, executed by their captors.[16]

***Example case*: Mutilation of civilian workers in Nuristan province on 17 March 2007**

On 17 March 2007, three civilian trucks, contracted to supply food to NATO/ ISAF forces in the Kamdesh district of Nuristan, were held up by a group of around eighteen armed insurgents, who proceeded to mutilate and assault the passengers as a "punishment for their collaboration" with foreign forces.[17]

The trucks were traveling to Asadabad in Kunar province when at around 01:45pm their way was blocked by a group of men in military-type uniform with black hats, who were armed with Kalashnikov rifles and rocket launchers.[18] One of the drivers managed toescape but the other two drivers along with two conductors were captured by the anti- government elements and immediately beaten and tied up. They were then robbed of all their personal items and some of the attackers shot holes into the gas tanks of the vehicles and set the three trucks on fire. All were completely burnt.[19] While the vehicles were burning the two drivers were forced to their knees and both had their left ear cut off with a knife. One victim explained that the other man's ear was still hanging from his head but that his own ear was severed entirely. After this assault the attackers told the victims to run away but then started firing at the ground in close proximity to their feet with the intention of further terrorizing them.[20] They forced them to change direction several times and only ceased scaring them after around another ten minutes of shooting and threats.[21] Eventually the men were allowed to run far enough to hide behind a large rock, though by then they were severely panicked and crying and two of them fainted a number of times. When they finally moved back to the road

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[16] Ali, Shaheen Sardar; Rehman, Javaid. (Winter, 2005) "The Concept of Jihad in Islamic International Law". Journal of Conflict & Security Law. 10 (3) pp. 321–43.
Afghanistan Penal Code (2017), Available at https://aceproject.org/eroen/regions/asia/AF/Penal%20Code%20Eng.pdf/view
Pike, John (1998), "Hizb-i-Islami (Islamic Party)", Intelligence Resource Program, Federation

[17] Article 49 of the Afghanistan Constitution mandates that "Forced labor shall be forbidden. Active participation in times of war, disaster, and other situations that threaten public life andcomfort shall be among the national duties of every Afghan. Forced labor on children shall not be allowed."

[18] Combat: Problems in Enforcement and Accountability, Cornell Int'l L.J. 2004 at 531
Pearn, J. (2003), Children and War, Journal of paediatrics and child health, 2003 - Wiley Online Library, at 141

[19] T. Mann (2012), The Afghan War: Creating the Economic Conditions and Civil-Military Efforts Needed for Transition, Center for Strategic and International Studies, Burke Chair

[20] Cohn, I., Southwick, M., Vandergrift, K. (2004), International Law Barring Child Soldiers in

[21] Simmons, B.A. (2009), Mobilizing for Human Rights: International Law In Domestic Politics,Cambridge University Press, 2009, at 451

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and flagged down a vehicle the insurgents reappeared and opened fire on the vehicle, causing it to crash into a wall. Only when the victims then returned to the site of the original attackthey were rescued by NATO/ ISAF forces that had been alerted by the smoke coming from the truck and arranged for medical treatment.[22] The drivers and conductors of the vehicles attacked were transporting food in theircapacity as civilian supply contractors and were not taking any active part in hostilities. The direct assault against a civilian target is thus a clear violation of international humanitarian law. It violates the express prescription of "humane treatment" and the ban of all "mutilation, cruel treatment and torture".[23]

Abusive and culturally insensitive practices during raids

> There are regular complaints about raids by international and national forces involving abusive treatment and culturally insensitive conduct as well as the destruction and theft of property. In some incidents such actions can rise to the level of "cruel treatment and torture" or "outrages upon personal dignity, in particular humiliating and degrading treatment," as prohibited per Common Article 3 of the Geneva Conventions. But even inappropriate conduct that does not reach this threshold severely damages relations with the affected community and jeopardizes the success of Afghan and international goals for strengthening the Afghan government.[24]

Illegal and improper practices in raids around the country have included instances of conduct ranging from the illegal killing and beating of civilians and the refusal of medical treatment for injured people to the booby-trapping of detainees, the inappropriate use of dogs and the issuing of severe threats. There have also been numerous accusations of theft and culturally insensitive conduct, in particular in relation to women.[25]

While raid practices in general have in many respects been improved compared to previous years, individual cases of misconduct continue to occur frequently enough to be a cause of serious concern. Two particularly problematic issues here are (i) the role and command and accountability structure of US military and paramilitary forces operating outside of NATO/ISAF's chain of command and mandate and (ii) the question of responsibility for the actions of Afghan forces conducting operations under the direct command of international personnel.

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[22] Rule 158 in the ICRC's study on customary IHL: Jean-Marie Henckaerts and Louise DoswaldBeck, Customary International Humanitarian Law, Volume I: Rules, ICRC, Geneva /

[23] Third Geneva Convention (1949), Convention relative to the Treatment of Prisoners of War - Protects members of the armed forces who have been taken prisoner. Sets forth the detainingpower's rights and obligations, including how prisoners are to be treated, Available at http://hrlibrary.umn.edu/instree/y3gctpw.htm

[24] Third Working Draft: September 18th, 2012, 22. Council on Foreign Relations (2021), The U.S. War in

[25] Hashimy, S.Q. (2022) Analysis of the United States' liability for war crime in Afghanistan, SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4138859 (Accessed: January 31,

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***Example case*: Raid on the house of an AIHRC staff member in Kandahar province on 4 January 2007**

On the night of 4 January 2007 a staff member of the AIHRC and his brother, a staff member of the UN, were assembled with their families in their shared house in Kandahar city's Loya Wala district. Following unspecified information, international and Afghan armed personnel conducted a raid of the compound. During the raid the families were submitted to abusive and culturally insensitive treatment and extensive destruction to private property was caused. Despite their acknowledged blamelessness and repeated official complaints, the victims have received neither an apology nor any compensation for the damage caused.

At approximately 08:00 pm the occupants of the house heard somebody attempting to gain entry to the compound. Inquiries as to who was there were met by an unknown Afghan voice demanding in a loud and angry tone "Open the door!" but giving no further information. Assuming that it was burglars, repeated shouts of "thief, thief" still yielded no response informing the inhabitants that this was an official raid. Indeed, encountering an armed man on the roof one of the brothers was immediately shot at but fortunately was not hurt. At this point there was an explosion, which blew in the front gate and between 30 and 40 armed Afghan men together with two armed US personnel entered the compound. The occupants were now told that Americans were here and that they should sit down and keep quiet.[26] Despite identifying themselves and their employers repeatedly inEnglish and Pashto the complainant and his brother were hooded and had their hands bound behind their back with plastic ties. One of the brothers was then "booby-trapped" by having the ties on his hands connected to an explosive charge used for blowing open doors. At the same time men and women were separated and the women of the household were taken to another room. There were no female personnel present so the women were dealt with exclusively by male forces. The invaders then proceeded to search the house and in the process caused severe destruction. A computer was destroyed, most windows broken and almost $600 in cash went missing.[27]

[26] Hashimy, S.Q. (2022) War crimes in Afghanistan, SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4308596 (Accessed: January 31, 2023).

[27] International Committee of the Red Cross, "Practice Relating to Rule 159: Amnesty," IHL Database, https://ihl-databases.icrc.org/customaryihl/eng/docs/v2_rul_rule159_sectiona. Ahmed Al-Dawoody (2017), International Humanitarian Law and Islam: An Overview, Available at: https://blogs.icrc.org/law-and-policy/2017/03/14/ihl-islam-overview/

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Only when the brothers' work IDs and documents were found did the raiding party acknowledge its mistake and call off the mission.[28] The brothers were freed and told to report to a nearby international military base to receive damages. On following up their complaint there, however, no apology and only a total of $100 in compensation was offered. When they rejected this as insufficient the American official present left the roomand the remaining Afghan forces threatened the victim that if he proceeded with this complaint he would be "beaten and thrown into jail".[29] A consequent investigation revealed that the raid was led by American paramilitary operators, who do not fall under the command of NATO/ ISAF or even the American armed forces. Numerous efforts to resolve the issue directly with the American embassy resulted in repeated promises of an investigation and swift action but yielded no clarification of responsibility, apology or redress of any kind.[30]

RECOMMENDATIONS

Above all, the Afghanistan Independent Human Rights Commission reminds all parties to the conflict to adhere to their obligations under international humanitarian and human rights law. Under no circumstances must civilians be made the primary target of attack, while the protection and welfare of Afghanistan's civilian population must be a priority in all operations. The Commission also emphasizes the strict prohibition on employing direct violence against civilians for political or military aims and strongly condemns any such actions.

If a violent incident affecting people taking no active part in the hostilities does occur then prompt and efficient action must be taken to investigate and make public the circumstances, acknowledge any errors and fully compensate the victims.

The Commission also urges all those involved in the fighting as well as local and national Community leaders to engage proactively in ensuring the effective protection of Afghan civilians.

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[28] Hitch, Georgia (2020), "What war crimes did Australian soldiers commit in Afghanistan and will anyone go to jail?", ABC News. Retrieved 2021-05-23.
Article 6(5) of the 1977 Additional Protocol II provides that "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons whohave participated in the armed conflict."

[29] "Paul Brereton inquiry uncovers list of alleged Australian war crimes in Afghanistan", 7NEWS.com.au. 2020-11-19. Retrieved 2021-05-23

[30] Hashimy, S.Q. (2022) War crimes in Afghanistan, SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4308596 (Accessed: January 31, 2023).

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- Article 49 of the Afghanistan Constitution mandates that "Forced labor shall be forbidden.
- Active participation in times of war, disaster, and other situations that threaten public life andcomfort shall be among the national duties of every Afghan. Forced labor on children shall not be allowed."
- Article 8 of Afghanistan Constitution highlights "The state shall regulate the foreign policy of the country on the basis of preserving the independence, national interests and territorial integrity as well as non-interference, good neighborliness, mutual respect and equality of rights."
- Article 23 of Afghanistan Constitution reminds that "Life is the gift of God as well as the natural right of human beings. No one shall be deprived of this except by legal provision."
- Article 24 of Afghanistan Constitution clearly mentions "Liberty is the natural right of human beings. This right has no limits unless affecting others freedoms as well as the public interest, which shall be regulated by law. Liberty and human dignity are inviolable. The state shall respect and protect liberty as well as human dignity."
- Article 7 of Afghanistan Constitution directs that "The state shall observe the United Nations
- Charter, interstate agreements, as well as international treaties to which Afghanistan has joined, and the Universal Declaration of Human Rights. The state shall prevent all kinds of

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terrorist activities, cultivation and smuggling of narcotics, and production and use ofintoxicants."

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- Article 29 of the Afghanistan Constitution states that "Persecution of human beings shall be forbidden. No one shall be allowed to or order torture, even for discovering the truth from another individual who is under investigation, arrest, detention or has been convicted to be punished. Punishment contrary to human dignity shall be prohibited."
- Article 30 of Afghanistan Constitution states that "A statement, confession or testimony
- obtained from an accused or of another individual by means of compulsion shall be invalid.
- Confession to a crime is a voluntary admission before an authorized court by an accused in a sound state of mind."
- Article 34 of Afghanistan Constitution states that "Freedom of expression shall be inviolable. Every Afghan shall have the right to express thoughts through speech, writing, illustrations as
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- well as other means in accordance with provisions of this constitution. Every Afghan shall have the right, according to provisions of law, to print and publish on subjects without prior submission to state authorities. Directives related to the press, radio and television as well as publications and other mass media shall be regulated by law.
- Article 38 of Afghanistan Constitution states that "Personal residences shall be immune from trespassing. No one, including the state, shall have the right to enter a personal residence or search it without the owner's permission or by order of an authoritative court, except in situations and methods delineated by law. In case of an evident crime, the responsible official shall enter or search a personal residence without prior court order. The aforementioned official, shall, after entrance or completion of search, obtain a court order within the time limit set bylaw"
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